No. 11113.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JACK EUGENE THOMSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

JAMES M. CARTER,
United States Attorney,
ERNEST A. TOLIN,
Assistant United States Attorney,
HOMER H. BELL,
Assistant United States Attorney.
United States Postoffice and Courthouse Bldg.,
Los Angeles 12,
Attorneys for Appellee.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

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APPELLEE'S BRIEF.

Jurisdictional Statement.

A. The United States District Court for the Southern District of California had jurisdiction of the appellant and subject matter contained in the one count indictment, under the provisions of United States Code, Title 50, Appendix, Section 311, making it unlawful for any person knowingly to fail or neglect to perform any duty required of him under the provisions of the Selective Training and Service Act of 1940, as amended.

B. This court has jurisdiction of the appeal under the provisions of United States Code, Title 28, Section 225(a) and (d).

Statement of the Case.

The appellant was indicted for violation of the Selective Training and Service Act of 1940, as amended. The indictment charged that the appellant was given a notice and an order by his Local Board to report for induction into the armed forces of the United States on May 24, 1945, and that said defendant did at said time and place knowingly and unlawfully fail and neglect to perform a duty required of him under said Act and the rules and regulations promulgated thereunder, that is to say, the defendant did then and there knowingly and unlawfully fail and neglect to report for induction into the armed forces of the United States, as so notified and ordered to do. [R. 3.]

This is an appeal by appellant Jack Eugene Thomson, from a judgment after trial in the District Court and a finding of guilty of the offenses charged in the indictment. Appellant was committed to the custody of the Attorney General or his authorized representative for imprisonment for one year in a federal penitentiary to be designated by the Attorney General, and, in addition thereto, to pay a fine unto the United States of America in the sum of $1,000.00 and to stand committed until paid. A jury was waived in the District Court by the respective parties with the consent of the trial judge. [R. 2.]

Summary of the Evidence.

The appellant registered under the Selective Training and Service Act of 1940; requested classification as a conscientious objector; was so classified at one time as 1-A-O and thereafter reclassified as 1-A; took and passed his physical examination and was found to be acceptable to the armed forces; was ordered to report to his local Board for induction but refused to do so. Thereafter he was charged under the Act, 50 U. S. C. A., App. §311, with knowingly and unlawfully failing and neglecting to report for induction into the armed forces, and was tried in the District Court without a jury and was convicted.

On appellant's registration card [Government's Exhibit No. 1] appellant stated his name, his place of residence, mailing address, and gave his age as 18, and his place and date of birth as April 21, 1925, Los Angeles, California. The date of registration was April 21, 1943. [R. 24.]

In appellant's Selective Service Questionnaire [Government's Exhibit No. 2], questions in series VII, "For Minister, Or Student Preparing For Ministry," were checked in ink by appellant.

The following printed statements in appellant's Selective Service Questionnaire in Series X were checked affirmatively by appellant:

> "1. By reason of religious training and belief, I am conscientiously opposed to war in any form and therefore claim exemption from combat training and service.
>
> "2. I am also, by reason of religious training and belief, conscientiously opposed to participation in noncombatant military service and request, in the event

I am found to be conscientiously opposed thereto, that, in lieu of my induction into the land or naval forces of the United States, I be assigned to work of national importance under civilian direction; and I agree to perform such work and conform to all rules and directions made and given with reference thereto by the President of the United States or by such person as he may designate or appoint for such purpose pursuant to such rules and regulations as he may prescribe."

Instructions printed over these statements were:

"Only registrants who are conscientiously opposed to combatant or non-combatant military service by reason of religious training and belief shall fill in this series, and shall obtain from the Local Board a special form (Form 47) on which to give substantial evidence of conscientious objection. The Local Board, after considering all other classes of deferment, will determine whether the registrant shall be classified as a conscientious objector on the basis of the claim made and the information contained in the special form." [R. 25-26.]

Under Registrant's Statement Regarding Classification, appellant wrote:

"2-C is the usual classification of milkers on this dairy and I think that I should be given this classification before my Class IV Classification is considered." [R. 26.]

On May 10, 1943, the Local Board classified the appellant 2-C.

On May 1, 1943, appellant was sent his notice of classification (Form 57). This entry appearing on appellant's Selective Service Questionnaire was apparently inadvertently omitted from the Transcript of Record. [R. 27.]

The Record is also inaccurate in that the entry appearing opposite 4-18-44 should appear opposite 4-17-44, and *vice versa.*

After appellant was reclassified 2-C and notified thereof, Louis S. Frye, Appeal Agent, took an appeal on behalf of appellant, dated 4-22-44. The Board of Appeals reclassified appellant 1-A-O and he was sent notice of the new classification on May 8, 1944. On May 15, 1944, he appeared before the Local Board requesting a 4-E classification and submitted a written statement to the Board in the form of a letter. Upon appeal to the Board of Appeal, appellant was classified 4-E but this classification was reconsidered by the Board of Appeal and the classification was changed to 2-C.

On September 6, 1944, appellant was reclassified 1-A by the Local Board on the ground that there was not sufficient evidence in the file to justify a 4-E classification. [R. 27.]

On September 20, 1944, registrant appeared before the Board, and, on the ground that no new evidence was submitted, he was continued in classification 1-A.

On November 28, 1944, appellant appealed his classification, and the Board of Appeal reviewed the file and decided that he should not be classified in any of the classes set forth in 623-1 of the Regulation and on January 3, 1945, ordered that the entire file be transmitted to the Department of Justice for the purpose of securing an advisory recommendation. Pursuant to notice, appellant personally appeared at a hearing of the Department of Justice on March 20, 1945. [R. 33.]

The report of that hearing, as set forth in the Transcript of Record [R. 32-45] indicates that the appellant

stated that he had never been a member of any church or religious organization and that his parents had not been members of any religious organizations. He stated that he knew very little about the Bible, that he had seldom read the Bible, and that he did not know any of the books of the Bible. He also stated that he had not been interested or active in any social welfare work or organization. While at the University of California in Los Angeles he did not participate in any of the activities of the religious welfare center conducted in that college community. Dr. E. P. Ryland, who appeared with appellant, as a witness in appellant's behalf, stated that appellant was not a religious conscientious objector in the ordinary sense, although he felt that the appellant was sincere in his attitude. [R. 36.]

Another reference [R. 38] stated that he had never heard appellant discuss religion and did not know whether or not he believed in God. Another witness testified similarly. [R. 38-39.] One stated that appellant was self-centered and put his own interest before those of others; that on one occasion appellant had gone into the cook house and had taken all the bananas and had eaten them himself, bananas being a scarce item of diet for the men on the farm at which appellant was employed, and that on this occasion appellant's demeanor was "The hell with anyone else." Appellant himself stated that he had never made any contribution to the Red Cross Blood Bank because, working in the dairy as he was, he needed all his strength. [R. 34.] The fellow employee further stated that appellant bragged that he was an agnostic and that he was only working at the dairy to secure a deferment as an essential agriculture worker, and that appellant had

never mentioned his opposition to war was based on the taking of human life, but always argued that the United States was wrong to be in the war and had no business to be in it in the first place.

At the same hearing a party who had been intimate with appellant as a neighbor stated that he knew no reason why appellant would be working in a dairy if it were not to gain the advantage of deferment, as registrant had made good grades in the University and his father was financially able to pay registrant's expenses there; that he had not talked recently with appellant concerning his religious beliefs, but that previously the appellant had professed to be an atheist, and that neither he nor his parents belong to any church, and that appellant in discussions of the international situation had expressed himself as being anti-British. [R. 41-42.]

Another party stated that appellant, one night at dinner, had stated that he was an atheist. [R. 42.]

A former intimate friend of appellant stated that appellant, in the summer of 1943, told him that appellant did not believe in the principles of this war and that he did not want to be a tool and that he did not like the political set up, and that appellant, at the time, was very bitter in his denunciation of the war from a practical standpoint. [R. 43.]

As a result of the foregoing testimony and other testimony not summarized here [R. 32-45] the hearing officer concluded that appellant's views as to war were not based upon any religious feeling and further that he was not conscientiously opposed by reason of religious training and belief to participation in war and military service. He,

therefore, recommended that appellant's objections be not sustained. [R. 44-45.]

Appellant's Exhibit No. C-1, in the trial below, The Special Form For Conscientious Objector, interrogates the appellant as to the nature and sources of his views in opposition to war. The answers are almost totally devoid of anything which would attribute his views to *religious* training and belief. He answers the first question by saying that he is conscientiously opposed to war and killing in any form as a violation of man's innate feeling and nature in an effort to lead a better life. He further stated that "War's waste of life and energies destroys all man's efforts toward a better natural and spiritual life, and I can take no part in it." [R. 48.]

Answer No. 2 is that he acquired his beliefs from his home training, from his parents, neither of whom is shown to have professed any religious belief or to have belonged to any religious organization, and from seeing movies such as "All Quiet On The Western Front" and "The Road Back." [R. 48.]

In answer to question No. 3, he stated he relied mostly for religious guidance upon John Thomson, presumably his father, who, it is indicated, was not shown to have professed any religious belief or associated with any religious group.

In answer to question No. 5, he stated that to the best of his ability he lives up to the Ten Commandments, including the one "Thou Shalt Not Kill." [R. 48-49.] (It might be noted parenthetically that several of the Ten Commandments are included in man-made penal codes and carry heavy penalties for their violation.)

In answer to question No. 6, which asks whether he has ever given public expression to the views therein expressed, he replied that he expressed his views in an editorial printed in his school paper in 1938. [R. 49.] That editorial is set forth in full in the Record. [R. 50-51.] No indication is professed in that editorial that opposition to war should be on a religious basis, but appears to be based upon the political views of the Socialist Party that wars are brought about by political bosses.

Under cross-examination, Government's witness Hugo A. Carlson, Chairman of Local Board No. 176, Reseda, California, testified that on November 5, 1944, the appellant requested a hearing before the Local Board and that he appeared in a hearing on November 15, 1944; that at the hearing on November 15, 1944, no new evidence was submitted and the I-A classification was continued by the Local Board. He further testified to the receipt of a letter dated November 28, 1944, and stated that this letter was considered by the Local Board and that the classification was continued. He further testified that the Board took into consideration the oral statements of appellant when he appeared before the Board on November 15, 1944, and testified that they were merely a repetition of the same statements he had previously made. [R. 54-55.]

The appellant, when examined by the Court, testified that neither he nor his parents adhered to any commonly recognized religion such as Baptist, Methodist, or any other named by the Court; that he was not aware that his parents were students of the Bible, that they never

instructed him in the Bible, nor urged him to read it, nor had they ever urged them to read any other religious works or literature; he further stated that they had given him no instruction at all in the sense that they taught the doctrines of any of the recognized creeds. He testified that his parents belong to no church but gave him instruction along the lines of his present belief and stated that his father's objection to war was strictly humanitarian.

During the argument of counsel at the close of the case, appellant's counsel argued:

> "We say that a broad or liberal definition of 'religious training and belief' should have been given by the selective service agencies and should be given by this Court, as was given by the Second Circuit in the Downer case and in the Kauten case.
>
> The Court: I don't think the record shows that they failed to do that. In the hearing here they inquired into all his background, his neighbors, friends, high school associates, his personal beliefs, conversations at dinner tables and his foreman, and they inquired from everyone who would ordinarily have expressed to them a man's views, what this man's views were, to see what his religious beliefs were. And they came to the conclusion that this belief was not based on religious training and belief." [R. 65-66.]

In announcing the verdict and decision the Court, in part, declared:

> "Assuming therefore that I had that power to review, I cannot say that the local board or the appeal

board acted arbitrarily or capriciously. I think that they extended a complete opportunity to the defendant here to be heard, that they did hear him, that they took everything into consideration and did not limit their inquiry to merely whether or not he was a member of any church or read any particular religious book or Bible, or any other book which espouses religious views or beliefs, but that they took into consideration everything that he had to offer, as well as his conduct, and life in the past, and his general attitudes as expressed by his conduct. Therefore I would have to find the defendant guilty in the event that the Flakowicz case is not followed by the Ninth Circuit because I cannot find that the draft boards were arbitrary and capricious.

"On the third point raised, which, in reality, was raised first, the construction of the statute, that is, the phrase 'religious training and belief,' I think that I have expressed myself on that during the course of the argument, but in order that it may be stated in this summary form, again I will state that I do not believe that the record shows a misconstruction of the statute. The boards did take into consideration everything about this man which he had to offer and did not limit themselves to any of the conventional means of getting religious training.

"That reviews the points that have been raised. I don't think that I have the power to weigh the evidence *de novo*. But in the event that the Circuit should hold that this Court had the power and the duty, I have already indicated that the motions to

strike if made would be denied and the rulings I have heretofore made would be followed; but in that event I think that I would be constrained to hold, were this Court held to be the trier of the fact, that this young man is not conscientiously opposed to war because of religious training and belief. So on the merits, were I trying it on the merits, I am afraid I would have to find him guilty."

For the full remarks of the Court, see the Transcript of Record, pages 65-69.

The Judgment was guilty as charged. [R. 69.]

Questions Presented by This Appeal.

1. May a registrant who has knowingly failed and neglected to report to the induction station as ordered so to do by his Local Board enter as a defense against a criminal prosecution the ground that his classification was erroneous?

2. Did the District Court erroneously interpret the meaning of the phrase "religious training and belief"?

3. [Appellant states as the second question presented by this appeal the query whether error was committed because the appellant was not permitted to present as a defense evidence that he was a conscientious objector. This does not constitute a valid question for submission to this Court for the reason that the Record fails to show that the appellant was not permitted to present as a defense evidence that he was not a conscientious objector.]

Argument.

I.

A Registrant Who Has Failed and Neglected to Report to the Induction Station as Ordered so to Do By His Local Board May Not Raise as a Defense Against Criminal Prosecution the Ground That His Classification Was Erroneous.

Falbo v. United States, 320 U. S. 549, 640 S. Ct. 346, 88 L. Ed. 305 (1944);

Estep v. United States (Smith v.United States), 327 U. S. 114, 66 S. Ct. 423, 90 L. Ed. 405 (1946).

In the *Estep* case, the Court said (pp. 115-116):

"In Falbo v. United States, 320 U. S. 549, we held that in a criminal prosecution under §11 of the Selective Training and Service Act of 1940 (54 Stat. 894, 50 U. S. C. App. §311) a registrant could not defend on the ground that he was wrongfully classified and was entitled to a statutory exemption, where the offense was a failure to report for induction into the armed forces or for work of national importance. We found no provision for judicial review of a registrant's classification prior to the time when he had taken all the steps in the selective process and had been finally accepted by the armed services. The question in these cases is whether there may be judicial review of his classification in a prosecution under §11 where he reported for induction, was finally accepted, but refused to submit to induction."

At page 122 the Court continued:

> "* * * The provision making the decisions of the local boards 'final' means to us that Congress chose not to give administrative action under this Act the customary scope of judicial review which obtains under other statutes. It means that the courts are not to weigh the evidence to determine whether the classification made by the local boards was justified. The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant."

The *Falbo* case held that a protesting registrant who is ordered to report for service cannot challenge his classification when on trial for violating an order of the Board until he has exhausted his administrative remedies. In the *Estep* and *Smith* cases it was held that where the registrant has exhausted his administrative remedies including all appeals, has reported for induction and has been finally accepted, but has refused to submit to induction, he may raise the question of jurisdiction of the Local Board. This question, as pointed out in the above excerpt, is reached *only if there is no basis in fact* for the classification which it gave the registrant. In the case now before this Court there was abundant basis in fact for the Local Board and the Appeal Board to classify the appellant as they did and to refuse to classify him as he

requested. The Record is replete with such facts and statements and further reference is made to them in this brief, *supra*. This was pointed out by the District Court at the time of pronouncing judgment. [R. 66-69.] The Local Board extends to the appellant a complete opportunity to present evidence and to be heard, and they considered his evidence and heard him and took everything into consideration which was submitted to them, including the extensive evidence presented at the hearing conducted by the Department of Justice, attended by appellant, on March 20, 1945. They did not limit their inquiry to merely whether or not he was a member of any church or read any particular religious book or Bible or any other book espousing religious views or beliefs, but took into consideration everything he had to offer, as well as his conduct, his life in the past, and his general attitudes as expressed orally, in writing and by his conduct. It is difficult to conceive how a more painstaking examination and consideration of appellant's claims to a different classification could have been made by his Local Board.

The record clearly shows, however, that the District Court permitted appellant more liberality than the law allows. Appellant was allowed to offer his entire Selective Service file. [R. 47.] This included all the evidence the appellant had to offer that he was a Conscientious Objector, except possible oral reiterations of the same things from the witness stand. When Mr. Carlson, Chairman of the Local Board which classified appellant, was cross-examined on the subject of what appellant's statements

to the Board had been, the Assistant United States Attorney trying the case objected on the ground that this line of questioning was immaterial, since the only material matter was whether the Local Board had ordered the defendant (appellant) to report for induction, and whether he had failed to appear. [R. 52-53.] The Court overruled this objection, and allowed the evidence to be admitted, subject to a motion to strike. [R. 53.]

When the appellant himself was testifying, the Assistant United States Attorney again objected to a line of questions which had as their object the impeaching of the classification given by the Local Board. [R. 60-61.] Again the Court, although remarking that he thought the objector was probably right, overruled the objection, and admitted the evidence subject to the same motion to strike. [R. 61.]

At the conclusion of the trial, the Court announced:

> "I have admitted evidence in the case and indicated that a ruling would be made. I will now affirm the rulings which I have heretofore made overruling the objection of the Government." [R. 66.]

Appellant's point is not supported by the record, so it is clear, therefore, that on this ground, the District Court committed no error, and the judgment should be affirmed.

II.

The Court Below Did Not Erroneously Construe the Meaning of the Phrase "Religious Training and Belief" in Adjudging the Appellant Guilty.

To begin with, the Court below had no jurisdiction to inquire into the meaning of the term, nor to admit evidence in any way touching upon the classification of the appellant, either upon the ground (1) that the Local Board was without jurisdiction, or upon the ground (2) that its classification was erroneous, as appellant had not exhausted his administrative remedies and reported for induction as ordered by his Local Board. [R. 3, 7, 23, 29, 45-46, 56]. (App. Op. Br. p. 2.)

Falbo v. United States, supra;

Estep v. United States, supra;

Smith v. United States, supra.

See:

Brief, supra, pages 13-16.

Incidentally, this fact distinguishes this case from the *Berman* case, referred to by appellant as involving the same points of law. (App. Op. Br. p. 10.) Although the *Berman* case was decided adversely to appellant, the appellant in that case stood in a much stronger position than does appellant here. In the *Berman* case, Berman reported to the induction station as ordered by his Local Board, but refused to be inducted. Appellant here did not report for induction as ordered. Accordingly, under the holdings of the Supreme Court, appellant here is not in a position to raise the point of classification or interpretation of the term "religious training and belief."

In any event, the point has been decided by this Circuit adversely to appellant's contention, and certiorari has been denied.

> *Berman v. United States,* 156 F. (2d) 377 (C. C. A. 9th 1946); cert. den. .....

That decision makes it abundantly clear that it is not the Court's function to determine what the law *ought* to be, but what it is. It is true that definitions can be found for words which vary so much from the commonly accepted connotation that the use of the word in the peculiar sense would convey nothing at all to the ordinary user of the word.

The fallacy of appellant's argument is that when Congress used the phrase "religious training and belief," it was not dealing in the realm of metaphysics and philosophy, nor attempting to render a syncretic exegesis of Kant, Carpenter, Hillel, Mill, Santayana, Dewey, James, and Einstein, but rather was taking hold of a common verbal symbol which had acquired, over a period of centuries, a pretty generally accepted and understood meaning by the public. Even if we did not have the express views of Congress to guide us, would it be reasonable to suppose that Congress, in its effort to convey to the public the law, would appropriate such a term and then intend that the term should be given the amorphous philosophical connotation suggested by the eclectic dissertation in appellant's brief? It is not rather to be supposed that when Congress used the term, it used it in the sense understood by the public to which it was speaking?

As pointed out in the Appellee's Reply Brief in the *Berman* case (pp. 43-57), however, we do not have to speculate, for Congress expressly rejected such a provision as the appellant now seeks to reach by his interpretation. Had Congress intended no limitation, it could just as easily have omitted the word "religious," as it was urged to do by some groups. Applying the well-known doctrines that words are to be deemed to have been used in their usual and ordinary sense, and that Congress is deemed to have used no superfluous words, plus the fact that Congress expressly rejected the suggestion that the law should be made to read as appellant now contends it should be interpreted, the contention of appellant must fall.

Practicality would indeed require that some such limitation be placed upon the right to claim the exemption. Appellant claims he was taught from early childhood to respect the sacredness of human life, to obey the Commandment, "Thou Shalt Not Kill," and to follow the Golden Rule. What young man hasn't? The men who composed our armed forces were not the product of families of killers, nor were they killers themselves. They were civilians, in ordinary peaceable pursuits, before the war. In fact, probably all or nearly all of them recoiled from the thought of killing a fellow human being, and felt, as appellant feels, that they could never bring themselves to kill a man. If such revulsion to war were a basis of exemption, it is probable that our government would have found it difficult or impossible to raise an army at all.

Thus, the District Court committed no error on this ground, and the judgment should be affirmed.

III.

A New Trial Should Not Be Granted nor the Cause Remanded on the Ground That the Defendant Was Not Permitted to Present as a Defense Evidence That He Was a Conscientious Objector Who Had Submitted to All Processes on the Road to Induction Except Actual Induction Itself.

This is not properly a question on appeal, for the record shows the statement of it, as made by appellant, to be erroneous in two particulars. First, it is not true that "defendant was not permitted to present as a defense evidence that he was a conscientious objector"; and second, it is not true that "he had submitted to all processes on the road to induction except actual induction itself."

As pointed out earlier in this Brief (page 16) the Court overruled the Government's objections to the admission of testimony and documentary evidence which were offered to prove that appellant was a conscientious objector and should have been classified as such. [R. 47, 52, 53, 60, 61, 66.] Moreover, appellant had not "submitted to all processes on the road to induction except actual induction itself," for it is undisputed—in fact it is stipulated—that *appellant did not report for induction* as ordered by his Local Board. [R. 3, 7, 23, 29, 45-46, 56.] (App. Op. Br. p. 2.)

If it be appellant's position that he had complied with all the orders of the Board and had been accepted by the military forces by reason of having submitted to a pre-induction physical examination and having been accepted preliminarily there, his position is refuted by the fact pointed out by Justice Frankfurter in his concurring

opinion in the *Estep* and *Smith* cases, at pages 138-139, as follows:

> "The question raised by the facts of this case has come before the Circuit Courts of Appeals for the First, the Second, the Third, the Fourth, the Fifth, the Sixth, the Seventh and the Eighth Circuits. All, eight of them, have ruled that judicial review of a draft board classification is not available, in a criminal prosecution, even though the registrant has submitted to the pre-induction physical examination. Sirski v. United States, 145 F. (2d) 749 (C. C. A. 1st 1944); United States v. Flakowicz, 146 F. (2d) 874 (C. C. A. 2d 1945); United States v. Estep, 150 F. (2d) 768 (C. C. A. 3d 1945); Smith v. United States, 148 F. (2d) 288 (C. C. A. 4th 1945); Koch v. United States, 150 F. (2d) 762 (C. C. A. 4th 1945); Fletcher v. United States, 129 F. (2d) 262 (C. C. A. 5th 1942); Klopp v. United States, 148 F. (2d) 659 (C. C. A. 6th 1945); United States v. Rinko, 147 F. (2d) 1 (C. C. A. 8th 1945); Gibson v. United States, 149 F. (2d) 751 (C. C. A. 8th 1945)."

Under the present procedure, if a selectee passes the pre-induction physical examination, he may be ordered up for induction within ninety days without undergoing another one, but when he reports at the induction station he must undergo, *inter alia,* a physical inspection to determine his final acceptability for service. See Army Regulation 615-500, Section 15, issued August 10. 1944.

That a selectee is not finally found acceptable under this procedure until after he has reported for induction is demonstrated by the fact that during the period from February 1944 to June 1946, 2,695,714 registrants re-

ported for induction and 230,581 were rejected at the induction station even though they had previously received certificates of fitness upon pre-induction examination. Thus 8.6% of men reporting were rejected. These facts were called to the attention of the Supreme Court in the *Flakowicz* case, and certiorari was denied.

> *United States v. Flakowicz,* 146 F. (2d) 874 (C. C. A. 2d 1945); cert. den. 325 U. S. 851, 65 S. Ct. 1086, 89 L. Ed. 1971 (1945).

See, also:

> *United States v. Rinko,* 147 F. (2d) 1 (C. C. A. 7th 1945); cert. den. 325 U. S. 851, 65 S. Ct. 1086, 89 L. Ed. 1971 (1945).

Since the so-called "point" of appellant is not supported by the Record, it should be disregarded, and the judgment affirmed.

Conclusion.

It is respectfully submitted that the judgment of conviction appealed from should be affirmed.

JAMES M. CARTER,
United States Attorney,

ERNEST A. TOLIN,
Assistant United States Attorney,

HOMER H. BELL,
Assistant United States Attorney.

Attorneys for Appellee.